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No. 06-671

Supreme Court, U.S.
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In The
Supreme Court of the United States

GUY ROLAND SEATON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 44, RULES OF THE SUPREME COURT

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PETITIONER SEATON'S PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

GROUNDS FOR GRANTING REHEARING

I. *CUNNINGHAM v. CALIFORNIA* IS AN INTERVENING CIRCUMSTANCE OF SUBSTANTIAL EFFECT JUSTIFYING REHEARING.

Petitioner Guy Roland Seaton requests rehearing of the order denying the requested writ of certiorari based on intervening circumstances of a substantial or controlling effect and other substantial grounds not previously presented.

At the time Seaton's petition was denied, January 8, 2007, it apparently seemed appropriate to not hold Seaton's petition pending the decision in *Rita v. United States,* 127 S.Ct. 551, 75 USLW 3243, 75 USLW 3246 (2006) and *Claiborne v. United States*, 127 S.Ct. 551, 75 USLW 3243, 75 USLW 3246 (2006), but given the intervening decision issued January 22, 2007 in *Cunningham v. California*, ___ S.Ct. ___, 2007 WL 135687, 75 USLW 4078 (2007), we would respectfully request that the Court revisit the decision to deny certiorari and hold Seaton's petition pending the *Rita* and *Claiborne* decisions.

Seaton's petition for certiorari poses substantially the same question as *Rita*. *Rita* presents the following three questions:

> 1. Was the district court's choice of within-Guidelines sentence reasonable?
>
> 2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?
>
> 3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

Seaton's petition presented the question:

> 1. Petitioners' sentence was imposed prior to *United States v. Booker*, 543 U.S. 220 (2005), and in violation of the Sixth Amendment. Before such a sentence violating *Booker*

> can be reaffirmed, must a district court give criminal defendants an opportunity to submit briefing arguing for a different sentence in light of the factors set forth in 18 U.S.C. § 3553(a), and *must the district court address the § 3553(a) factors rather than simply find a guideline sentence reasonable? This question presents some of the same issues this Court will address in United States v. Rita* (No. 06-5754), in which certiorari was recently granted.

(emphasis supplied)

The intervening *Cunningham* decision has made clear that this Court is prepared to revisit in some fashion its *Booker* jurisprudence in *Rita* and *Claiborne*:

> *Booker's remedy for the Federal Guidelines, in short, is not a recipe for rendering this Court's Sixth Amendment case law toothless. Further elaboration here on the federal reasonableness standard is neither necessary nor proper. The Court has granted review in two cases – to be argued and decided later this Term – raising questions trained on that matter. Claiborne v. United States,* ___ U.S. ___, 127 S.Ct. 551, ___ L.Ed.2d ___; *Rita v. United States,* ___ U.S. ___, 127 S.Ct. 551, 855, ___ L.Ed.2d ___.

Cunningham v. California, slip opinion, p. 3 (emphasis supplied).

Later in *Cunningham*, the Court stated:

> In an opinion written by Justice BREYER, also garnering a five-Member majority, the Court faced the remedial question, which turned on an assessment of legislative intent: What alteration would Congress have intended had it known that the Guidelines were vulnerable to a Sixth Amendment challenge? Three choices were apparent: the Court could invalidate in its entirety the Sentencing Reform Act of 1984 (SRA), the law comprehensively delineating the federal sentencing system; or it could preserve the SRA, and the mandatory Guidelines regime the SRA established, by attaching a jury-trial requirement to any fact increasing a defendant's base Guidelines range; finally, the Court could render the Guidelines advisory by severing two provisions of the SRA, 18 U.S.C. § 3553(b)(1) and 3742(e) (2000 ed. and Supp. IV). 543 U.S., at 246-249, 125 S.Ct. 738. [footnote omitted] Recognizing that "reasonable minds can, and do, differ" on the remedial question, the majority concluded

that the advisory Guidelines solution came closest to the congressional mark. *Id.*, at 248-258, 125 S.Ct. 738. . . .

Under the system described in Justice BREYER's opinion for the Court in *Booker,* judges would no longer be tied to the sentencing range indicated in the Guidelines. But they would be obliged to "take account of" that range along with the sentencing goals Congress enumerated in the SRA at 18 U.S.C. § 3553(a). 543 U.S., at 259, 264, 125 S.Ct. 738. [footnote omitted] Having severed § 3742(e), the provision of the SRA governing appellate review of sentences under the mandatory Guidelines scheme, see *supra,* at ___, and n. 11, the Court installed, as consistent with the Act and the sound administration of justice, a "reasonableness" standard of review. 543 U.S., at 261, 125 S.Ct. 738. Without attempting an elaborate discussion of that standard, Justice BREYER's remedial opinion for the Court observed: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is reasonable." *Ibid.*[FN13] *The Court emphasized the provisional character of the Booker remedy.* Recognizing that authority to speak "the last word" resides in Congress, the Court said:

FN13. *While this case does not call for elaboration of the reasonableness check on federal sentencing post-Booker, we note that the Court has granted review in two cases raising questions trained on that matter*: *Claiborne v. United States* and *Rita v. United States* [citations omitted]. In *Claiborne,* the Court will consider whether it is consistent with the advisory cast of the Guidelines system post-*Booker* to require that extraordinary circumstances attend a sentence varying substantially from the Guidelines. *Rita* includes the question whether is it consistent with *Booker* to accord a presumption of reasonableness to a within-Guidelines sentence.

In this regard, we note Justice Alito's view that California's DSL is essentially the same as post-*Booker* federal sentencing. *Post,* at ___-___. To maintain that position, his dissent previews, without benefit of briefing or argument, how "reasonableness review," post-*Booker,* works.

> *Post,* at ___-___. It is neither necessary nor proper now to join issue with Justice ALITO on this matter.

Cunningham v. California, slip opinion at p. 10 (emphasis supplied).

Finally, at footnote 15 of *Cunningham*, the following appears:

> FN15. Justice ALITO, however, would do just that. His opinion reads the remedial portion of the Court's opinion in *Booker* to override *Blakely,* and to render academic the entire first part of *Booker* itself. *Post,* at ___-___. There would have been no majority in *Booker* for the revision of *Blakely* essayed in his dissent. Grounded in a notion of how federal reasonableness review operates in practice, Justice ALITO "necessarily anticipates" a question that will be aired later this Term in *Rita* and *Claiborne. See supra,* at ___, n. 13. While we do not forecast the Court's responses in those cases, we affirm the continuing vitality of our prior decisions in point.

Justice Alito's *dissent*, referred to above, joined in by Justice Kennedy and Justice Breyer, included this opinion:

> The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for "reasonableness"; and both – the California law explicitly, and the federal scheme implicitly – require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict. Because this Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment, the same should be true with regard to the California system. I therefore respectfully dissent.

Cunningham v. California, slip opinion, p. 17.

Clearly Seaton cannot "forecast the Court's responses in those cases [*Rita* and *Claiborne*]," yet equally clearly their decision will impact for better or worse the determination

whether his sentence was reasonable, or was not accorded the proper standard of review on appeal, or perhaps more fundamentally, will determine that his sentence and others like it was imposed in violation of the Fifth and Sixth Amendments whether reasonable or not. For this reason Seaton argues that his petition should be held pending the decision of *Rita* and *Claiborne* in light of the clear *prognosticum* of *Cunningham's* competing *dicta*.

The posture of Seaton's case is similar to that of other cases in which this Court has first denied certiorari, then upon petition for rehearing, held the case pending the decision of what would be a *later* controlling case, after the decision of which it then granted rehearing, granted certiorari, vacated and remanded.

For example, in *Criston v. United States*, 543 U.S. 1117, 125 S.Ct. 1112 (2005), Criston's certiorari petition was denied shortly before *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) was decided and before certiorari was granted in *United States v. Booker* on August 4, 2004. *United States v. Booker*, 542 U.S. 956, 125 S.Ct. 11 (2004). Criston filed a petition for rehearing on July 16, 2004 which was first distributed on July 30, 2004. Although certiorari had not yet been granted on *Booker*, this Court held Criston's petition for rehearing until after certiorari was granted and *Booker* was decided, almost six months later. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005).

Seaton's petition arises out of the Ninth Circuit. His appeal was decided May 5, 2006 and rehearing was denied July 14, 2006. Shortly thereafter the Ninth Circuit granted rehearing *en banc* in two consolidated cases, *United States v. Carty* and *United States v. Zavala*, 462 F.3d 1066 (9th Cir. August 23, 2006). The Ninth Circuit intended to engage in a complete review of the application of *Booker* at sentencing and on appellate review:

> The court invites supplemental briefs by the parties addressing some or all of the following questions on the role of the United States Sentencing Guidelines in a district court's sentencing decision after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005):
>
> **1.** Do we have jurisdiction to review appeals of within-Guidelines range sentences?

2. If we have jurisdiction to review within-Guidelines range sentences, are such sentences entitled to a presumption of reasonableness, or should we review such sentences no differently than we review outside-Guidelines range sentences? If within-Guidelines range sentences are entitled to a presumption of reasonableness, is this presumption conclusive? Rebuttable? If rebuttable, how can such a presumption be rebutted?

3. How should we review a post-*Booker* sentence for reasonableness? Do we review only whether the district court complied with *Booker*'s mandate to consider the 18 U.S.C. § 3553(a) factors? If so, is this review de novo? Do we independently review the sentence imposed for reasonableness? If so, how do we determine whether a sentence is reasonable? What legal and factual matters, if any, must we consider? Is this review for abuse of discretion? Are factual findings decided by the district court reviewed for clear error, abuse of discretion, or on some other standard of review? Does it matter whether the findings are pertinent to the calculation of the advisory Guidelines range or pertinent to the application of the other 18 U.S.C. § 3553(a) factors?

4. What procedure is a district court required to follow in sentencing a defendant within the advisory Guidelines range? In particular, what should be the district court's duty, if any, to articulate its consideration of the section 18 U.S.C. § 3553(a) factors?

5. If distinct from the procedure for within-Guidelines range sentences, what procedure is a district court required to follow in sentencing a defendant above or below the advisory Guidelines range?

6. What weight does the advisory Guidelines range have, in relation to other 18 U.S.C. § 3553(a) factors? In conducting a sentencing proceeding, may a district judge announce that he will impose a sentence within the advisory Guidelines range unless the parties present compelling reasons for imposing a sentence outside of that range? On review, should we determine whether the district court has given the advisory Guidelines range the appropriate weight, and if so, how?

United States v. Carty, 465 F.3d 976, 977 (9th Cir. 2006).

But then this Court granted certiorari in *Rita* on November 3, 2006, *Rita v. United States*, 127 S.Ct. 551 (2006), and now *Carty* and *Zavala* are on hold pending the decisions in *Rita* and *Claiborne*.

In addition, shortly after Seaton's appeal was decided at the Ninth Circuit, another panel of the Ninth Circuit issued *United States v. Montgomery*, 462 F.3d 1067 (9th Cir. August 25, 2006). *Montgomery* held that when a case receives a *Booker* remand, at a minimum the district court must entertain written submission from counsel addressing the § 3553 factors that counsel think would affect the district court's decision in deciding whether to impose a non-guideline sentence:

> [W]e believe it is clear that allowing the parties to file written submissions is . . . necessary for the district court to meaningfully comply with *Ameline*'s[1] remand procedure. . . . there may be considerations that were either not presented or not emphasized during the original sentencing procedure that now, under *Ameline,* provide a basis for re-sentencing. . . .

United States v. Montgomery, 462 F.3d 1067, 1070 (9th Cir. August 25, 2006).

This did not happen in Seaton's case. Indeed, Seaton was denied a *Booker* remand based solely on a statement in an order denying an appeal bond to the effect that the district judge would have imposed the same sentence without the guidelines. This statement was made without request for input from the parties, without any briefing from the parties, and without any consideration of or statement of reasons regarding the § 3553 factors. Indeed at the time the district court made this statement in the order denying an appeal bond (an order which the Ninth Circuit reversed), *Booker* had not yet been decided, and under the then binding guidelines, the district judge was prohibited from considering certain key sentencing factors, such as Seaton's age (now 64) and the fact that his wife, (now aged 68), is on the Stanford liver transplant list, which she will be taken off of if Seaton is imprisoned leaving no one to care for her during and

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[1] *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).

after a transplant.[2] Mr. and Mrs. Seaton's contract with Stanford Medical Center Liver Transplant Program expressly provides that if Guy Seaton can no longer be his wife's support person, then she cannot be on or remain listed on the transplant list. Seaton's imprisonment will be tantamount to a death sentence for Mrs. Seaton. This was not a factor the district court could even consider pre-*Booker*, but which could result in a substantially reduced sentence were Seaton ultimately allowed a *Booker* resentencing. Seaton continues on release at this time under conditions set by the Ninth Circuit pending disposition of this petition.

In other words, the Ninth Circuit upheld the "reasonableness" of Seaton's sentence without any record upon which to determine whether it was reasonable or not. Surely whatever this Court may decide to do in *Rita* and *Claiborne*, the standard of reasonableness review applied to Seaton's case will not be permitted. It did nothing to remedy the Sixth Amendment violation which occurred in his case, that is, a substantial guideline enhancement based on a hotly disputed loss determined by a judge alone, by a preponderance of the evidence standard. Seaton was prevented from making a showing that the sentencing judge relied upon flawed, mistaken facts which were not established and could not have been established by proof beyond a reasonable doubt to a unanimous jury of his peers.

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[2] She is suffering from liver failure. She is listed on the Stanford Medical Hospital liver transplant list. She is anemic, requires regular blood transfusions, and receives weekly injections of Procrit. She is unable to care for herself because of extreme fatigue, confusion and pain. She suffers from hepatic encephalopathy, which is a complication of liver failure of toxic substances that accumulate in the blood and impair the function of her brain cells. Mr. Seaton, is her only support and caregiver. They both live on Social Security. She will be removed from the transplant list if she loses Mr. Seaton as her support and caregiver. In order for her to remain on the transplant list, she must have a support person to provide the medical services she needs to remain on the list. Medicare/Medicaid services do not provide for this level of care.

II. *CUNNINGHAM* EXPRESSES THE CONSTITUTIONAL NORM THAT INCREASED PUNISHMENT SHOULD BE PREDICATED ON FACTS PROVEN BEYOND A REASONABLE DOUBT.

Seaton's sentence was enhanced based upon guidelines factors determined by the judge alone based on a preponderance of the evidence, factors "neither inherent in the jury's verdict nor embraced by the defendant's plea." Furthermore, as Justice Alito stated in his *Cunningham dissent,* "The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*, 543 U.S. 220 (2005)." The majority decision in *Cunningham* states that "any fact that *exposes* a defendant to a greater potential sentence must be found by jury, not a judge, and established beyond a reasonable doubt." [slip opinion, p. 8; emphasis supplied] The tension between the majority and dissent will inevitably require revision in the *Booker* remedy provision when *Rita* is decided, which will likely impact Seaton's sentencing and appeal.

III. THE DISTRICT COURT FAILED TO STATE CLEAR AND PRINCIPLED REASONS FOR THE SENTENCE IT IMPOSED, IN VIOLATION OF 18 U.S.C. § 3553 AND *BOOKER*, MAKING MEANINGFUL APPELLATE REVIEW FOR REASONABLENESS IMPOSSIBLE.

The sentencing judge in a post-sentence motion for bail pending appeal made a rote statement that she was denying bail pending appeal because she would give the same sentence under advisory guidelines as she would give under the mandatory guidelines. This is hardly a statement of justification for the appeal court to sustain a sentence based upon reasonableness. The district court must state the reasons for the sentences imposed under 18 U.S.C. § 3553(c), regardless of whether a sentence falls within the applicable guideline range or not. Although a district court is not required to recite any 'magic words' to show that it has fulfilled its obligation to be mindful of

the factors Congress has instructed it to consider in § 3553(a), courts are required to give reasons for imposing a specific sentence. Such reasons are necessary for meaningful appellate review. The district court in Seaton's case failed completely to address any § 3553 factor in its statement that it would have imposed the same sentence under an advisory guideline.

To impose sentence in conformity with the Constitution, the court must engage in an explicit analysis of the § 3553 sentencing factors else the reasonableness review mandated by *Booker* is an empty promise. In Seaton's case the appellate court *de facto* invoked a presumption of reasonableness review, because it had no record upon which to determine the reasonableness of the district court's decision. Instead this was simply one more sentence based upon a guideline range determined by judicial fact finding under a preponderance standard in violation of the Fifth and Sixth Amendments.

CONCLUSION

Seaton's petition for rehearing should be held pending decisions in *Rita* and *Claiborne*. This Court appears ready to put some teeth back into the Sixth Amendment and remedy the remedy of *Booker*, but unless this petition is granted or held pending the decisions in *Rita* and *Claiborne*, it will be too late for Petitioner Seaton.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44, Rules of the Supreme Court, counsel hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

William Mallory Kent